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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 39049 & 39156
	)	
v.	)	
	)	
KRISTINA M. QUINTANA,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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HONORABLE MICHAEL E. WETHERELL
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STATEMENT OF THE CASE

Nature of the Case

Kristina Quintana pled guilty to one charge of grand theft, one charge of burglary, and two counts of grand theft by possession of stolen property. The proceedings for the charge of grand theft were held before a different judge at the district court level, but both sentencing judges relied on the same presentence investigation report and considered each other's sentences as they imposed each of Ms. Quintana's sentences. As such, most of the issues on appeal are identical, and so the cases were consolidated for purposes of appeal.

In the first case, for the lone grand theft charge, Ms. Quintana received a unified sentence of fourteen years, with three years fixed. In the second case, she received a unified sentence of ten years, with four years fixed, for the burglary charge, and unified sentences of fourteen years, with four years fixed for each of the grand theft by possession of stolen property charges. The second grand theft by possession sentence was made consecutive to the other two charges, which were concurrent. This resulted in an aggregate sentence of twenty years, with eight years fixed, in the second case, which was made concurrent with the sentence from the first case.

Ms. Quintana alleges that her sentences represent an abuse of the district courts' sentencing discretion. In particular, she argues that the judge in the second case disregarded her mental illnesses as a mitigating factor, despite clear evidence of their impact on her. The abuse of discretion is evident when that sentence is compared with the first case, where the judge actually mitigated Ms. Quintana's sentence because of the role those illnesses played in her actions. Beyond that, Ms. Quintana contends that

neither judge sufficiently considered several other mitigating factors also present in her case.

Furthermore, the Idaho Supreme Court deprived Ms. Quintana of due process, equal protection, and effective assistance of appellate counsel when it denied her motion to augment the record with documents explicitly considered by the second district court judge. As such, she respectfully requests that appellate counsel be provided with access to the requested document and should be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

Statement of the Facts and Course of Proceedings

In the first case, Supreme Court Docket Number 39049, Ada County Case No. CR-FE-10-6046 (*hereinafter*, case number 39049),[1] Ms. Quintana was charged with one count of grand theft and two counts of grand theft by unauthorized control. (39049 R., p.5.)[2] In exchange for Ms. Quintana's guilty plea to Count I (grand theft), the State agreed to dismiss the two charges of grand theft by unauthorized control. (39049 R., p.53.) After Ms. Quintana entered her guilty plea to Count I, the district court decided to request a copy of the presentence report prepared in Supreme Court Docket Number 39156, Ada County Case Number CR-FE-10-21005 (*hereinafter*, case number 39156), and also determined that there was no need to supplement that report with additional evaluations. (39049 Tr., p.20, Ls.4-9.) However, that district court was informed that "Judge Copsey requested additional documentation [in case number

[1] The two cases proceeded simultaneously. This is designated as the first case because, chronologically, it was the first case in which a sentence was imposed.
[2] As there are two separate records and two separate transcripts, each is identified by reference to the corresponding Supreme Court Docket Number.

39156] concerning Ms. Quintana and reset sentencing to August 03, 2011[,] for that purpose. Upon completion, that information will [be] provided to this Court and Attorneys in this matter." (39049 Presentence Investigation Report (*hereinafter*, PSI), p.3.)[3] The prosecutor noted that there was one difference between the PSIs, in that the police reports relating to case number 39049 had been attached to the PSI provided to the district court in that case. (39049 Tr., p.23, Ls.16-20.)

In case number 39049, the district court reviewed the PSI and concluded: "It is clear that there are psychological factors involved with regard to this defendant. . . . But it is clear to this court that this defendant needs structured programs. . . ." (39049 Tr., p.45, Ls.16-25.) In consideration of the role those psychological factors played in regard to Ms. Quintana's actions, the district court imposed her sentence, but informed her: "I will tell you but for these [psychological] reports it would probably be a five year sentence, but I'm going to impose a three-year fixed sentence with an eleven-year indeterminate sentence." (39049 Tr., p.46, Ls.3-7; 39049 R., pp.53-55.) Ms. Quintana did not file a motion for reduction of sentence pursuant to I.C.R. Rule 35 (*hereinafter*, Rule 35) in case number 39049. She did, however, timely appeal from the judgment. (39049 R., p.60.)

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[3] As with the transcripts and records, the two PSIs are identified by reference to the corresponding Supreme Court Docket Number. 39049 PSI page numbers correspond with the page numbers of the electronic file "QuintanaPSI.pdf." 39156 PSI page numbers correspond with the page numbers of the electronic file "39156 State v. Quintana PSI.pdf." Included in these files are the PSI report as well as all the documents attached thereto (for example, police reports and addendums to the PSI). Although the two electronic files are not identical, differing in length and document order, the transcript indicates that both district courts used the same PSI. (39049 Tr., p.23, Ls.1-13 ("Following the plea it was indicated to the court that Judge Copsey ordered a presentence report in another case, and the parties agreed that the court could make use of that presentence report in the sentencing in this case. I have now received those materials. . . . I authorized counsel to file any supplemental materials which they felt might be appropriate. No supplemental materials have been filed. . . .").)

In case number 39156, Ms. Quintana was charged with six counts of burglary, six counts of grand theft, and six counts of grand theft by possession of stolen property. (39156 R., pp.62-63.) Pursuant to a plea agreement, Ms. Quintana pled guilty to one count of burglary and two counts of grand theft by possession of stolen property, and, in exchange, the State dismissed the remaining fifteen charges. (39156 R., p.111.) Upon reviewing the same PSI as the district court in case number 39049, the district court in case 39156 concluded: "This is not a mental health issue. This is someone who is trying to avoid the consequences." (39156 Tr., p.45, Ls.22-24.) This district court dismissed Ms. Quintana's diagnosed mental illnesses as not worth consideration because "while she's bipolar, we have -- I would say half the population at this point is bipolar, so -- [sic]," and, "you don't tell [the psychological evaluators] the full extent of your criminal activity prior to this. And so as a result, they -- they decide that what this was instead was bipolar disorder." (39156 Tr., p.35, Ls. 2-4, p.46, Ls.10-14.) It also mentioned that "[t]he prison never even reviews any of the mental health records that are provided in the presentence report." (39156 Tr., p.46, Ls.15-19.) It further disparaged the value of the provided evaluations because "the psychologist at that time[4] having given Miss Quintana a series of tests -- and I'd just note that most of the assessments that she -- that we had here, they don't really do the in-depth testing that you do when you have a full psychological evaluation." (39156 Tr., p.38, L.22 - p.39, L.2; *see also* 39156 PSI, pp.41-48 (the evaluation to which the district court referred).) After dismissing the information contained in the psychological evaluations, this district

[4] This refers to the evaluation performed on Ms. Quintana when she was seventeen. (39156 Tr., p.38, L.15-23.) Ms. Quintana was twenty-three at the time of sentencing. (39156 Tr., p.36, L.7.)

court proceeded to impose Ms. Quintana's sentence based on its own determination of Ms. Quintana's psychological impulses.

Rather than consider the diagnoses articulated in the psychological reports, the district court in case number 39156 determined that Ms. Quintana was simply trying to avoid consequences for her actions. (39156 Tr., p.41, Ls.19-20, p.42, L.13, p.45, Ls.22-24.) It also decided that Ms. Quintana had victimized her co-defendant, Shantel King, because it had also read Ms. King's PSI.[5] (39156 Tr., p.40, Ls.6-9.) As a result, it imposed a ten-year unified sentence, with four years fixed, on Ms. Quintana for Count I (burglary), a fourteen-year unified sentence, with four years fixed, for Count VI (grand theft by possession), concurrent with Count I, and a unified sentence of fourteen years, with four years fixed, for Count VII (grand theft by possession), consecutive with Counts I and VI. (39156 Tr., p.47, L.16 - p.48, L.11.) In the aggregate, Ms. Quintana's sentence in case number 39156 was twenty years, with eight years fixed, concurrent with the sentence imposed in case number 39049. (39156 Tr., p.48, Ls.11-14; 39156 R., pp.111-14.)

Ms. Quintana filed a motion for reconsideration of her sentence pursuant to Rule 35 in case number 39156 and requested leave to supplement the motion. (39156 R., p.121.) She subsequently filed two addenda to her motion. (39156 R., pp.124, 130.) They contained numerous letters of support from friends and family members.[6] (39156 R., pp.125-29, 133-36.) They all expressed their continuing support

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[5] Ms. Quintana requested that this document be augmented to the record. (Motion to Augment and Suspend Briefing Schedule and Statement in Support Thereof, filed March 7, 2012.) That request was denied by the Idaho Supreme Court. (Order Denying Motion to Augment and to Suspend the Briefing Schedule, April 4, 2012.)

[6] The letters submitted with the first addendum were also presented to the district court at sentencing, and the district court did, in fact, consider them at that time. (39156 R., p.138.)

for Ms. Quintana. For instance, several of the authors offered to do what they could to help her rehabilitate. (*See* 39156 R., pp.125-29, 131-36.) Several also explained the extent to which Ms. Quintana's mental illnesses, as well as the prescribed medication, affect her. (*See* 39156 R., pp.125-29.) Ms. Quintana also wrote a letter to the district court, explaining that she had already completed all the classes available to her, but that she was taking advantage of what programs she could. (39156 R., pp.131-32.) She also expressed her remorse, and pleaded for leniency. (39156 R., pp.131-32.) A letter from an unidentified friend also talked about Ms. Quintana's efforts to get what programming was available through the prison.[7] (R., p.135.)

The district court, however, denied the Rule 35 motion. (39156 R., p.140.) In doing so, it claimed it had considered Ms. Quintana's mental illnesses, but provided no further discussion regarding their impact on its decision. (*See* 39156 R., pp.137-140.) Instead, the district court focused on Ms. Quintana's criminal record, the nature of the offenses, and an incident where Ms. Quintana had informed the prison staff that she was suffering complications to a high-risk pregnancy, which later was discovered to be a fabrication. (R., pp.139-140.) Ms. Quintana timely appealed from the judgment in case number 39156. (39156 R., p.117.)

Since the sentences were both based on the same information, contained in the PSI originally ordered in case number 39156, the arguments on appeal were going to

[7] This letter evidently continued on subsequent pages, but the additional pages were not included in the record. (*See* 39156 R., 135.) Ms. Quintana attempted to locate the remainder of that document and augment the record, but was unsuccessful. (*See, e.g.,* Motion to Augment and Suspend Briefing Schedule and Statement in Support Thereof, filed March 7, 2012; Order Denying Motion to Augment and to Suspend the Briefing Schedule, April 4, 2012.)

be the same, and so Ms. Quintana moved that the two cases be consolidated on appeal. That motion was granted.

Ms. Quintana presented evidence to both district courts regarding several mitigating factors present in her case. First, Ms. Quintana reported being diagnosed with several mental health conditions, including bipolar disorder and chronic depression, at age thirteen. In addition, the Mesilla Valley Hospital staff diagnosed her with oppositional defiant disorder, depression, post traumatic stress disorder (*hereinafter*, PTSD), and polysubstance abuse. (39156 PSI, pp.16.) According to her adoptive mother, these issues began to present themselves after Ms. Quintana reported that she was raped when she was twelve. (39156 PSI, pp. 9-10.) The Idaho Department of Health & Welfare reconfirmed her bipolar diagnosis in 2011, classifying it as bipolar disorder type I with psychotic features.[8] Her family and friends reported to the district court in case number 39156, pursuant to Ms. Quintana's Rule 35 motion, that when she takes her medications, she is a valued and contributing member to society. (39156 R., pp.125, 126, 128.) However, these medications also had significant side effects, which would have notable impact Ms. Quintana. (39156 R., pp.125, 128.) In fact, those side effects caused her to stop taking those medications. (39156 R., p.128.) When she is not on her medications, Ms. Quintana lacks good judgment and is more susceptible to influence from her friends. (39156 R., p.125.)

[8] Bipolar disorder type I is the more severe variety of bipolar disorder, in which mood swings between mania and depression constitute drastic variations from normal behavior. National Institute of Mental Health, U.S. Dept. of Health and Human Services, "Bipolar Disorder," pp.4-5 (2008), http://mentalhealth.gov/health/publications/bipolar-disorder/nimh-bipolar-adults.pdf. These episodes are more drastic and longer in duration than those experienced in patients with bipolar disorder type II. *Id.* They may also lead to the need for immediate hospitalization. *Id.*

In regard to the incident with the alleged pregnancy, Ms. Quintana reported to the prison medical staff that she was experiencing vomiting and vaginal bleeding, which caused her to fear for the success of her pregnancy. (39156 PSI, p.87.) Accordingly, she was experiencing considerable emotional distress. (39156 PSI, p.87.) She based her belief that she was pregnant on a positive home pregnancy test following an incident of domestic battery at the hands of a former spouse. (39156 PSI, p.53.) To support her claim, she presented a letter, supposedly from a doctor in New Mexico, which purported to confirm the pregnancy. (39156 PSI, p.87.) Upon examination by medical personnel, however, it was determined that Ms. Quintana was not pregnant, nor had she recently been pregnant. (39156 PSI, p.87.) When confronted about the matter, Ms. Quintana admitted to forging the letter from the doctor. (39156 PSI, p.53.)

On the other hand, Ms. Quintana also accepted responsibility for her actions and agreed to pay restitution for the losses associated with all the charges, not just those to which she pled guilty. (39156 Tr., p.20, L.23 - p.21, L.7.) The restitution for all those charges totaled $11,430.94, a sum for which Ms. Quintana is jointly and severally liable with her co-defendant. (39156 Tr., p.20, L.19 - p.21, L.7.)

Ms. Quintana's appeals challenge both district court judges' consideration of these factors as they imposed her sentences. Her appeal in case number 39156 also challenges the district court's denial of her Rule 35 motion because it failed to sufficiently consider the recognized sentencing objectives in light of the new evidence she presented.

ISSUES

1. Whether the district court in case number 39156 abused its discretion when it imposed an aggregate sentence of twenty years, with eight years fixed, upon Ms. Quintana following her plea of guilty to burglary and grand theft by possession of stolen property.

2. Whether the district court in case number 39156 abused its discretion when it denied Ms. Quintana's Rule 35 motion in light of the new evidence she presented.

3. Whether the district court in case number 39049 abused its discretion when it imposed a unified sentence of fourteen years, with three years fixed, upon Ms. Quintana following her plea of guilty to grand theft?

4. Whether the Idaho Supreme Court denied Ms. Quintana due process and equal protection when it denied her Motion to Augment with Ms. King's PSI in light of the district court's express consideration of that information

ARGUMENT

I.

The District Court In Case Number 39156 Abused Its Discretion When It Imposed An Aggregate Sentence Of Twenty Years, With Eight Years Fixed, Upon Ms. Quintana Following Her Plea Of Guilty To Burglary And Grand Theft By Possession Of Stolen Property

A. Introduction

The district court in case number 39156 insufficiently considered several mitigating factors present in Ms. Quintana's case. The most notable of these was Ms. Quintana's mental health issues, which this district court declared to be a non-issue, despite the fact that the district court in case number 39049 had already sufficiently considered that same factor and, based on the same information, actually reduced Ms. Quintana's sentence because of the role her mental health issues played in her actions. By insufficiently considering this and the other mitigating factors, the district court in case number 39156 insufficiently considered Idaho's recognized sentencing objectives, and so imposed an excessive sentence in an abuse of its discretion.

B. The District Court In Case Number 39156 Did Not Sufficiently Consider Ms. Quintana's Diagnosed Mental Health Issues

Ms. Quintana asserts that, given any view of the facts, the individual sentences, as well as the aggregate sentence in case number 39156 of twenty years, with eight years fixed, are excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 772 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Ms. Quintana does not allege that her sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, she must show that, in light of the governing criteria, the sentence is excessive considering any view of the facts. *Id.* The governing criteria, or sentencing objectives, are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* The protection of society is the primary objective the court should consider. *State v. Charboneau*, 124 Idaho 497, 500 (1993). Therefore, a sentence that protects society and also accomplishes the other objectives will be considered reasonable. *Id.*; *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). This is because the protection of society is influenced by each of the other objectives, and as a result, each must be addressed in sentencing. *Charboneau*, 124 Idaho at 500.

There are several factors that the appellate court should consider to determine whether the objectives are served by a particular sentence. *State v. Knighton*, 143 Idaho 318, 320 (2006). They include, but are not limited to: "the defendant's good character, status as a first-time offender, sincere expressions of remorse and amenability to treatment, and support of family." *Id.* Insufficient consideration of these factors has been the basis for a more lenient sentence in several cases. *See, e.g., Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991); *State v. Carrasco*, 114 Idaho 348, 354-55 (Ct. App. 1988), *rev'd on other grounds*, 117 Idaho 295, 301 (1990); *State v. Shideler*, 103 Idaho 593,

595 (1982). In this case, several of those factors are present, but were insufficiently considered by the court as it crafted Ms. Quintana's sentence, and, as a result, the sentence does not serve the sentencing objectives, and is excessive.

First, the Idaho Supreme Court has recognized that I.C. § 19-2523 not only suggests, but requires, the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999). Ms. Quintana had been treated for depression and bipolar disorder for several years. (39156 Tr., p.12, L.22 - p.13, L.2.) She has also been diagnosed with oppositional defiant disorder, depression, PTSD, and polysubstance abuse. (39156 PSI, p.16.) The Idaho Department of Health & Welfare reconfirmed the diagnosis of bipolar disorder type one with severe psychotic features in 2011. (39156 PSI, pp.16, 115.) According to her adoptive mother, these conditions began to manifest after Ms. Quintana reported that she was raped. (39156 PSI, p.9.)

These issues may have even presented themselves during Ms. Quintana's incarceration. For example, she reported to the prison medical clinic complaining of complications to an ongoing pregnancy and was experiencing considerable emotional distress as a result. (39156 PSI, p.87.) And while medical personnel found no physical evidence of an ongoing or recent pregnancy (39156 PSI, p.87), and Ms. Quintana admitted forging the doctor's note which supported her claim (39156 PSI, p.53), the emotional issues underlying such actions speak to the nature of Ms. Quintana's emotional disorders. Furthermore, the district court in case number 39156 pointed out that during this same time, Ms. Quintana was seen on video "having a great old time." (39156 Tr., p.44, Ls.15-16.) Bipolar disorder is defined as the diversion from emotional norms between mania and depression, and such an oscillation between the two

extremes would be consistent with that condition. *See* n.8, *supra* (explaining that these different mood episodes, which may include symptoms of both a manic and depressive episode, are part of the effects of bipolar disorder).)

The district court in case number 39156, however, dismissed this mitigating factor out of hand. For instance, it declared that "while she's bipolar, we have -- I would say half the population at this point is bipolar, so -- [sic]." (39156 Tr., p.35, Ls.3-4.) The district court went on: "I don't think this is a mental health issue. I don't think treatment is an issue here." (39156 Tr., p.38, Ls.19-21.) Besides the fact that the district court is presumably ill-equipped to offer its own opinions as to matters that are within the ken of trained medical professionals, the error in the district court's assertions in this regard is made clear when its analysis is compared with the other discussion of these same issues, based on the same information, in case number 39049. The district court in case number 39049 took the time to review the statutory factors and the record in this regard. (39049 Tr., pp.40-45.) Upon doing so, it concluded: "It is clear that there are psychological factors involved with regard to this defendant . . . . it is clear to this court that this defendant needs structured programs." (39049 Tr., p.45, Ls.16-18, 23-25.) As a result, it recommended Ms. Quintana's participation in the therapeutic community, as well as in any other programs that the prison staff deemed necessary. (39049 Tr., p.47, Ls.7-13.)

The most telling aspect of that district court's consideration of Ms. Quintana's mental health issues in case number 39049, however, came during its imposition of sentence: "Ms. Quintana, I will tell you but for these [psychological] reports it would probably be a five-year sentence, but I'm going to impose a three-year fixed sentence with an eleven-year indeterminate sentence." (39049 Tr., p.46, Ls.3-7.) This sentence

recognizes the role Ms. Quintana's mental health issues played in her actions, considers the impact they will play going forward, provides opportunities for her to address them while in custody, and mitigates the sentence accordingly.[9]

Instead of engaging in a similar, sufficient consideration of this factor, the district court in case number 39156 dismissed Ms. Quintana's mental health issues as a factor entirely. (*See, e.g.,* 39156 Tr., p.38, Ls.19-21.) Among its rationales for doing so was that "the psychologist at that time [when Ms. Quintana was 17] having given Miss Quintana a series of tests -- and I'd just note that most of the assessments that she -- that we had here, they don't really do the in-depth testing that you would do when you have a full psychological evaluation." (39156 Tr., p.38, L.22 - p.39, L.2; *see also* 39156 PSI, pp.41-48 (report to which the district court referred).) The district court continued, "while she's bipolar, we have -- I would say half the population at this point is bipolar, so -- [sic]," and, "you don't tell [the psychological evaluators] the full extent of your criminal activity prior to this. And so as a result, they -- they decide that what this was instead was bipolar disorder."[10] (39156 Tr., p.35, Ls. 2-4, p.46, Ls.10-14.) The district court actually went so far as to state, "I'll note for the record that the prison will

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[9] As the district court in case number 39049 recognized, it could still impose a long indeterminate term as part of the sentence, which addresses the other sentencing objectives. (*See* Tr., p.46, 7-10.) However, that sentence correctly considers Ms. Quintana's mental health issues and provides her with a rehabilitative opportunity, as well as the opportunity to demonstrate her progress when she is potentially released on parole. This, therefore, demonstrates what a proper consideration of such a factor should be, and by comparison, illustrates how the district court in case number 39156 failed to sufficiently consider this factor, thus abusing its discretion.

[10] The district court appears to have concluded that the two conditions are mutually exclusive (*i.e.*, if a person has a criminal character, she cannot also suffer from bipolar disorder), despite the fact that bipolar disorder "causes unusual shifts in mood, energy, activity levels, and the ability to carry out day-to-day tasks," not that it causes criminal propensities. *See* n.8, *supra*. As such, its factual determination that the psychologists would misdiagnose Ms. Quintana with bipolar disorder instead of a criminal character is clearly erroneous.

do additional testing. The prison never even reviews any of the mental health records that are provided in the presentence report."[11] (39156 Tr., p.46, Ls.15-19.) Having disparaged the value of these evaluations, the district court proceeded to sentence Ms. Quintana based on its own determinations of her psychological motivations.

Its primary conclusion was that "nobody is making her accountable. There are no consequences for this kind of behavior." (39156 Tr., p.39, Ls.15-17, p.41, Ls.19-20.) Based on its independent determination in this regard, the district court in case number 39156 concluded that "[t]his is not a mental health issue. This is someone who is trying to avoid the consequences. . . . Because if you look through here there is a -- there is a pattern of stealing, thievery from other people and yet virtually no consequence for that." (39156 Tr., p.45, L.22 - p.46, L.4.) This conclusion was made despite the fact that the district court in case number 39049 had just imposed a significant sentence as a consequence to a similar charge (grand theft), and that judge had properly considered Ms. Quintana's mental health conditions in doing so. (39049 Tr., p.46, Ls.3-7.) The district court in case number 39156 did not even make recommendations for Ms. Quintana to participate in available treatment programs to address her mental health issues while she is imprisoned, as the district court in case number 39049 did. (*Compare* 39156 Tr., p.46, L.21 - p.50, L.3 *with* 39049 Tr., p.47, Ls.7-13.)

Therefore, this record is replete with evidence of the district court's insufficient consideration of Ms. Quintana's mental health condition in case number 39156. As it is

[11] Apart from the interesting perspective that the prison staff would not review such records, even if they do perform their own evaluations, this observation does not provide any reason for the district court to discount the information in the evaluations contained with the presentence report, especially since I.C. § 19-2523 requires the district court to consider such information. *See* I.C. § 19-2523; *Hollon*, 132 Idaho at 581. In addition, as there is no evidence in the record which supports the district court's assertions in this regard, any finding of fact to that end is clearly erroneous.

required to consider this factor, the failure to do so should alone cause this Court to vacate that sentence and remand for new sentencing.

C. In Addition To Insufficiently Considering Ms. Quintana's Mental Health Condition, The District Court In Case Number 39156 Also Insufficiently Considered Several Other Mitigating Factors When It Imposed An Excessive Sentence

Besides her mental health issues, there were several other mitigating factors in Ms. Quintana's case that the district court failed to sufficiently consider. The first was the fact that Ms. Quintana experienced a traumatic childhood. *See State v. Williamson*, 135 Idaho 618, 620 (Ct. App. 2001). In *Williamson*, the Court of Appeals considered the defendant's abusive childhood, which served as a precursor to the abuse of various narcotic substances and the impact that played on the offense. *Id.* Ms. Quintana also suffered trauma in her childhood, reporting that she had been raped when she was twelve years old. (39156 PSI, p.9.) The significance of this event is magnified because, according to Ms. Quintana's adoptive mother, it was only after that event that Ms. Quintana began lying and engaging in other inappropriate activities, as well as manifesting symptoms of her mental illnesses. (39156 PSI, p.10.) This means that, even under the district court's skewed perspective of Ms. Quintana's mental health condition in case number 39156 (all her actions are a product of lying and other negative behavior that were never accompanied by sufficient consequences), the rape was the precursor to Ms. Quintana's crimes and thus had an impact on the offense. *Compare Williamson*, 135 Idaho at 620. Therefore, this factor needed to be considered in mitigation. This district court, however, did not discuss it at all. (39156 Tr., pp.37-50.) This reveals its insufficient consideration of the factors in this case, and thus, its abuse of discretion.

Additionally, Ms. Quintana possesses several redeeming characteristics, regardless of her prior record. Even the habitual criminal will not be subjected to excessive sentences. *See Carrasco*, 114 Idaho 354-55. For example, Ms. Quintana accepted responsibility for her actions and agreed to pay restitution for the losses alleged in all the charges, not just the ones to which she pled guilty, which totaled $11,430.94.[12] (39156 Tr., p.20, L.19 - p.21, L.7.) The willingness to pay restitution, in particular, is another factor the district courts should consider in mitigation. *State v. Richard Hall*, 114 Idaho 887, 889 (Ct. App. 1988). Furthermore, acknowledgment of guilt and acceptance of responsibility, by the defendant are critical first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010), *rev. denied*. By making these acknowledgements, evidenced by her willingness to repay all the victims, Ms. Quintana demonstrated that she has taken these critical first steps.

In addition, she had been pursuing advanced education and was slated to graduate from the Toni and Guy Hairdressing Academy's cosmetology course in November 2010. (39156 Tr., p.17, Ls.6-8; 39156 PSI, p.14.) Finally, Ms. Quintana has the ongoing support of her adoptive family. (39156 PSI, p.9; 39156 R., pp.133-34.) Family constitutes an important part of a support network, which can help in rehabilitation. *See Kellis*, 148 Idaho at 817 (holding that familial support offered to affirm the defendant's innocence does not equate to familial support offered in consideration of rehabilitation, implying that had the support been offered for rehabilitation, it would be a mitigating factor worthy of consideration). Therefore, since

[12] Ms. Quintana is jointly and severally liable for this amount with her co-defendant in these cases. (39156 Tr., p.21, Ls.3-4.)

she has such a support network, she would be more likely to be successful in community-based rehabilitation programs, were she timely afforded the opportunity to participate in such programs.

Furthermore, the decision to make some of the sentences consecutive to one another so that the total term extends beyond the maximum length permitted for any one of the charges,[13] given the mitigating factors present in this case, also constitutes an abuse of discretion. When reviewing consecutive sentences, the appellate court should consider the total aggregate sentence as well as the fixed sentences. *See Alberts*, 121 Idaho at 209; *State v. Ross*, 92 Idaho 709, 718 (1968), *disapproved of on other grounds by State v. Claudette Hall*, 95 Idaho 110, 113 (1972). In *Alberts*, the Court of Appeals specifically considered the fact that Mr. Alberts should have been able to take advantage of the treatment opportunities available to him in prison with a shorter sentence. *Alberts*, 121 Idaho at 209; *see also State v. Dunnagan*, 101 Idaho 125, 126 (1980) (recognizing the same). Similarly, as the district court in case number 39049 implied, Ms. Quintana should be able to receive effective rehabilitative opportunities during a three-year fixed term sentence. (*See* 39049 Tr., p.46, L.2-10.) Therefore, the district court's decision to impose a twenty-year aggregate sentence, and especially, an eight-year fixed term, in case number 39156 by running some of the sentences consecutive to one another caused Ms. Quintana's sentence to be excessive, just as the sentence in *Alberts* was excessive.

[13] The maximum sentence length for burglary is ten years. I.C. § 18-1403. The maximum sentence length for grand theft as Ms. Quintana committed it (*see* 39156 R., pp. 75-76; *compare* I.C. § 18-2407(1)) is fourteen years, with a mandatory minimum prison sentence of one year. I.C. 18-2408(2)(a). Ms. Quintana's aggregate sentence was for a unified term of twenty years, with eight years fixed. (39156 Tr., p.48, 11-14.)

A sufficient examination of all these factors reveals that a more lenient sentence, one aimed at rehabilitation, also addresses all the other objectives – protection of society, punishment, and deterrence. *See State v. Ransom*, 124 Idaho 703, 713 (1993) (requiring that alternative sentences still address all the sentencing objectives). When a sentencing court retains jurisdiction, it still imposes and executes a sentence.[14] Therefore, both the retributive and the deterrent effects of the imposed sentence are still present. *See State v. Crockett*, 146 Idaho 13, 14-15 (Ct. App. 2008) (discussing how even a sentence for a period of probation addresses all the sentencing objectives and how the court's continuing jurisdiction affects those objectives). Such a sentence punishes Ms. Quintana by depriving her not only of her liberty during her period of retained jurisdiction, but several of her rights (such as the right to possess a firearm) as well, since this is a felony offense. These results, along with the imposed sentence, also serve as a deterrent to society at large. *See id.* Furthermore, it deters Ms. Quintana specifically because the sentence need not be suspended should she perform poorly or otherwise violate the terms of the rider. Even if she completes the rider and is placed on probation, the looming sentence still deters her from violating her probation.

[14] Defense counsel in case number 39049 recommended the district court retain jurisdiction and permit Ms. Quintana to participate in the rider program. (39049 Tr., p.37, L.24 - p.38, L.8.) Counsel in case number 39156 did not make any specific sentencing recommendations, but did note that the Therapeutic Community program should be recommended. (Tr., p.36, Ls.1-4.) In this instance, having a recommendation for participation in that rehabilitative program would likely increase her chances of actually receiving that treatment. Therefore, as rehabilitation, one of the recognized sentencing objectives needs to be sufficiently, the district court's decision in case number 39156 to not make that recommendation (and thus insufficiently consider that objective) constitutes an abuse of discretion.

In this case, the district court does not lose anything in terms of protection of society, deterrence, or punishment by retaining jurisdiction. Society receives the same protection by retaining jurisdiction as it does by incarcerating Ms. Quintana. She is in the custody of the Department of Corrections either way. She cannot harm society during that period, so society is protected whether she is on a rider or in prison. Furthermore, the district court retains the ability to relinquish jurisdiction and leave Ms. Quintana incarcerated for the entire fixed term of the sentence if she does not show progress. And if the district court does that, the Parole Board has broad discretion over whether to release her on parole during the indeterminate term of her sentence. *See, e.g., State v. Stover*, 140 Idaho 927, 931 (2005). However, the district court could relinquish jurisdiction and enforce the prison sentence knowing that all the sentencing objectives were properly addressed.

What the rider does provide that a term sentence does not is the opportunity to rehabilitate. As the Idaho Supreme Court has noted, rehabilitation for young offenders, like Ms. Quintana, is more likely now than in the future. *See State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971). Timing of rehabilitation is an important consideration when addressing that objective. *See id*; *State v. Nice*, 103 Idaho 89, 91 (1982); *Cook*, 145 Idaho at 489; *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988). Therefore, the time to employ such an alternative is now.

The district court in case number 39156, did not even recommend that Ms. Quintana participate in any rehabilitative programs during her imprisonment. (*Compare* 39156 Tr., pp.37-50 *with* 39049 Tr., p.47, Ls.7-13.) In so doing, the district court in case number 39156 deprived Ms. Quintana of the opportunity to engage in

timely rehabilitation, and thus of effective rehabilitation. As a result, this sentence does not serve the sentencing objectives, notably rehabilitation and protection of society, and is thus excessive and otherwise represents an abuse of discretion. This Court should remedy that abuse.

II.

The District Court In Case Number 39156 Abused Its Discretion When It Denied Ms. Quintana's Rule 35 Motion In Light Of The New Evidence She Presented

A motion to alter an otherwise lawful sentence pursuant to Rule 35 is addressed to the sound discretion of the sentencing court, and is essentially a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Huffman*, 144 Idaho 201, 203 (2007). When petitioning for a sentence reduction pursuant to Rule 35, the defendant must show her sentence is excessive in light of new or additional information presented to the sentencing court. *Id.* "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). Therefore, the district court needed to sufficiently consider the recognized sentencing objectives in light of the mitigating factors as they were altered by the new evidence Ms. Quintana presented. *See id.*; *Huffman*, 144 Idaho at 203. A failure to do so should result in a more lenient sentence. *See Cook*, 145 Idaho at 489-90; *Alberts*, 121 Idaho at 209; *Carrasco*, 114 Idaho at 354-55; *Shideler*, 103 Idaho at 595.

Ms. Quintana presented the district court with several letters discussing her positive character traits and her struggles with her mental conditions. (39156 R., pp.125-29, 131-36.) Regarding Ms. Quintana's mental conditions, her family and

friends reported that when she takes her medications, she is a valued and contributing member to society. (39156 R., pp.125, 126, 128.) However, these medications also have significant side effects which negatively impact Ms. Quintana. (39156 R., pp.125, 128.) Those side effects have caused her to stop taking those medications. (39156 R., p.128.) When she is not on her medication, she lacks good judgment and is more susceptible to influence from her friends. (39156 R., p.125.) Several of the authors of these letters also expressed their continuing support for Ms. Quintana, offering to do what they could to help her rehabilitate. (*See* 39156 R., pp.125-29, 131-36.) Ms. Quintana also wrote the district court a letter, expressing her remorse for her actions and explaining her dedication to rehabilitation while in prison. For example, she informed the district court that she had earned her GED and was now participating in the only programs available to her – Alcoholics Anonymous and Narcotics Anonymous. (39156 R., p.131.)

The district court, however, denied her motion. (39156 R., p.140.) In doing so, it claimed it had considered Ms. Quintana's mental illnesses, but provided no further discussion regarding their impact on its decision. (*See* 39156 R., pp.137-140.) Instead, the district court focused on Ms. Quintana's criminal record, the nature of her offenses, and the incident where Ms. Quintana had informed the prison staff that she was suffering complications to a high-risk pregnancy, which later was discovered to be a fabrication. (R., pp.139-140.) As at the original sentencing, the district court in case number 39156 did not sufficiently consider, or appreciate, the impact her mental health condition had on those events.

The letters submitted to the district court as part of the Rule 35 motion reveal the depth of the impact of Ms. Quintana's mental conditions. First, they reaffirm the fact

that the conditions began to present when she reached her teen years. (*See, e.g.,* 39156 R., p.126.) This was the same time that Ms. Quintana reported her rape (39156 PSI, pp.9-10.), reaffirming the need to sufficiently consider her traumatic childhood as well. *See Williamson*, 135 Idaho at 620. Second, they reveal the nature of those conditions, and thus the need for sufficient consideration of her mental health condition. The district court claimed it considered that factor, but given its aversion to that factor at the sentencing hearing (*see, e.g.,* 39156 Tr., p.46, Ls.13-14), its single, unsupported, unreasoned statement claiming that it now had done so is not encouraging. It certainly did not engage in the detailed and sufficient examination of the aspects of this factor or the role Ms. Quintana's illnesses played in her actions, unlike its counterpart in case number 39049. (*Compare* 39156 Tr., p.46, Ls.13-14 *with* 39049 Tr., pp.40-45.) Ms. Quintana's efforts at rehabilitation also reflect a need to reevaluate her amenability to treatment, which is a factor the district court should consider in mitigation, as it affects the defendant's potential for effective rehabilitation. *See, e.g., Kellis*, 148 Idaho at 815.

Because the district court in case number 39156 did not sufficiently consider the mitigating factors and sentencing objectives in light of this new evidence, which indicates an increased need to impose a more lenient sentence, one which would afford Ms. Quintana the opportunity to participate in programs and then be timely paroled, so that she could apply those lessons in a real-world situation, with the help of her support network of family and friends, the district court failed to sufficiently consider both the factors and the sentencing objectives. Therefore, the decision to deny Ms. Quintana's Rule 35 motion constitutes an abuse of discretion that this Court should remedy.

III.

The District Court In Case Number 39049 Abused Its Discretion When It Imposed A Unified Sentence Of Fourteen Years, With Three Years Fixed, Upon Ms. Quintana Following Her Plea Of Guilty To Grand Theft

While this district court did sufficiently consider Ms. Quintana's mental health issues, as described in Section (I)(B), *supra*, it could have imposed a more lenient sentence based on a sufficient consideration of the other mitigating factors present in this case, as described in Section (I)(C), *supra*.[15] (*See* 39049 Tr., pp.39-48 (wherein the only mitigating factor the district court discussed was Ms. Quintana's mental health issues).) Thus, because of the insufficient consideration of the mitigating factors besides Ms. Quintana's mental health issues, it imposed an excessive sentence in an abuse of discretion.

IV.

The Idaho Supreme Court Denied Ms. Quintana Due Process And Equal Protection When It Denied Her Motion To Augment With Ms. King's PSI In Light Of The District Court's Express Consideration Of That Information

A. Introduction

Both state and federal precedent recognizes that a defendant is entitled to due process and equal protection under the law pursuant to the Fourteenth Amendment of the federal constitution and Article I, §13 of the Idaho constitution. That precedent also recognizes that part of due process and equal protection is providing the defendant with an opportunity to defend herself. On appeal, this includes providing the defendant, particularly the indigent defendant, with access to a sufficient record. The Idaho

[15] Specifically, these are Ms. Quintana's traumatic childhood, her willingness to pay restitution for all charges, her acceptance of responsibility and acknowledgment of guilt, her pursuit of advanced education opportunities, and her ongoing familial support.

Supreme Court's decision to deny Ms. Quintana's request to augment the record in her case with documents that were clearly considered by the district court in case number 39156 when it imposed her sentence deprived her of that sufficient record, and thus, deprived her of due process and equal protection under the law.

Furthermore, because Ms. Quintana has a statutory right to her direct appeal, those constitutional provisions also entitled her to effective assistance of counsel. To be effective, counsel needs to be able to make a professional evaluation of the questions that might be presented on appeal or consider all the issues that might affect the determination in this case. Without access to the requested document, counsel is unable to fulfill those expectations. As such, the Idaho Supreme Court's decision to deny her motion to augment the record with documents that it clearly considered also deprived Ms. Quintana of effective assistance of counsel.

Accordingly, counsel should be provided with access to the requested document and should be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

B. By Denying Ms. Quintana's Motion To Augment, The Idaho Supreme Court Deprived Her Of Due Process And Equal Protection

The Idaho Constitution, as well as the federal Constitution, guarantees the criminal defendant due process of law. U.S. CONST. amend. XIV; ID CONST., art. I, §13. Part of that right is the meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *State v. Card*, 121 Idaho 425, 445 (1991), *overruled on other grounds by State v. Wood*, 132 Idaho 88 (1998); *State v. Doe*, 147 Idaho 542, 544 (Ct. App. 2009). And while Idaho maintains independent interpretation of Article I, §13, it will look to the federal interpretations of due process for guidance in that

interpretation. *State v. Delling*, 152 Idaho 122, 128 (2011). As such, Idaho precedent has interpreted the two sections as coextensive. *Id.*

In order to provide a meaningful opportunity to be heard, and in order to render a proper decision in an appellate case, the appellate court needs to "receive and consider all papers, records, and files presented to the trial court on the hearing of a contested motion. It would be . . . a hazardous endeavor for [the appellate court] to rule upon an appeal without access to all relevant material *used in the hearing below*." *Sheel v. Rinard*, 91 Idaho 736, 738 (1967) (emphasis added); I.A.R. Rule 28(c) ("The clerk's or agency's record shall also include . . . *statements* or affidavits *considered by the court* or administrative agency in the trial of the action or proceeding) (emphasis added); *see also Smith v. State*, 146 Idaho 822, 837-38 (2008) (recognizing the defendant has a due process right to review the information considered by the district court, and the failure to assert that claim constitutes ineffective assistance of counsel). As such, the appellate record needs to include all the information considered by the district court in case number 39156, which would include those made in Ms. King's PSI.

The district court in case number 39156 explicitly stated that it considered Ms. King's PSI when it imposed sentence on Ms. Quintana: "We're focusing on victims in this case. But as part of that, *having read Miss King's presentence report* and seeing the interaction, I consider Miss King a victim of Miss Quintana." (39156 Tr., p.40, Ls.6-9.) Not only did it rely on the information contained in that PSI report, but it used it as an aggravating factor in its determination on sentence. Without that document, there is no way to determine if its use of Ms. King's PSI is another example of the district court's insufficient consideration of the appropriate sentencing factors in case number 39156. Accordingly, counsel should be provided with access to the requested

document and should be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

C. By Denying Ms. Quintana's Motion To Augment, The Idaho Supreme Court Deprived Her Of Effective Assistance Of Counsel, And Thus, Of Due Process

The United States Supreme Court has determined that the Equal Protection Clause of the Fourteenth Amendment provides for a right to counsel on appeal for indigent defendants. *Douglas v. California*, 372 U.S. 353, 357-58 (1963). Without the assistance of counsel, the appellate process is reduced to "a meaningless ritual." *Id.* at 358. That right inherently demands that such counsel be effective. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985).

In order to be effective on appeal, counsel must make a conscientious examination of the case and file a brief on the client's behalf which presents the best arguments available. *Anders v. California*, 386 U.S. 738, 744 (1967). The Idaho Supreme Court has held that the starting point for evaluating the effectiveness of counsel in criminal actions is the AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION. *State v. Charboneau*, 116 Idaho 129, 137 (1989) (*overruled on other grounds by Card*, 121 Idaho at 432.) Those standards establish that, to be effective,

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider *all issues that might affect the validity of the judgment of conviction and sentence*.... Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

Standard 4-8.3(b) (emphasis added). Therefore, in order to determine whether there are issues affecting the validity of the sentence (*i.e.*, indicate that it is excessive),

counsel needs to consider all the evidence the district court considered, or else, be ineffective. *See id.* Without being able to examine Ms. King's PSI, counsel is unable to consider all the issues which might affect the validity of the sentence or advise Ms. Quintana on the probable role that information may play in her appeal.

As a result, the Idaho Supreme Court's decision to deny Ms. Quintana's Motion to Augment with Ms. King's PSI deprived her of effective assistance of counsel on her appeal, and thus, deprived her of due process. Accordingly, counsel should be provided with access to the requested document and should be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

CONCLUSION

Ms. Quintana respectfully requests that this Court reduce her sentences as it deems appropriate. Alternatively, she respectfully requests that her case, particularly case number 39156, be remanded to the district court for a new sentencing hearing.

Otherwise, she respectfully requests that counsel be provided with access to Ms. King's PSI and that counsel be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

DATED this 10th day of May, 2012.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of May, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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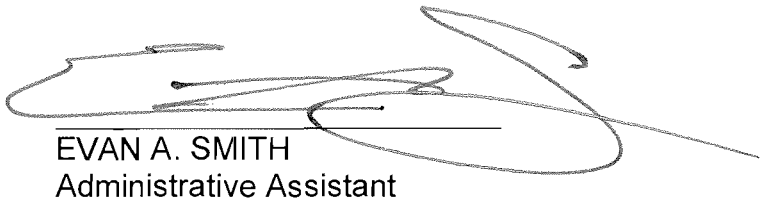

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